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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-651

UNITED BROADCASTING COMPANY, INC.,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION
AND
WASHINGTON COMMUNITY BROADCASTING CO.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE WASHINGTON COMMUNITY BROADCASTING CO., IN OPPOSITION

MONROE OPPENHEIMER
1156 15th Street, N.W.
Washington, D.C. 20005

Attorney for Respondent
Washington Community
Broadcasting Co.

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OPINIONS BELOW

The decision of the Court of Appeals, not yet reported, appears at Pet. App. 1a-2a. The Commission's decision (Pet. App. 1b-30b) is reported at 55 FCC 2d. 416. Petitions for reconsideration and rehearing of the Commission decision were denied May 28, 1976 (Pet. App. 1c-7c) as reported at 59 FCC 2d. 663. The Initial Decision of the ALJ (Pet. App. 1d-154d) is reported at 55 FCC 2d 431.

JURISDICTION

The judgment of the Court of Appeals was entered on July 8, 1977 (Pet. App. 1a-2a). Petitions for rehearing were denied on August 8, 1977 (Pet. App. 1f and 1g). The petition for certiorari was filed on November 4, 1977. The jurisdiction of this Court was invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Court of Appeals had a rational basis for affirming the Commission's denial of Petitioner's license renewal for violations of the Commission's technical rules, designed to assure good engineering practices. (Petitioner claimed that the Commission's decision was "no more than conclusory, providing the reviewing court with virtually no analysis whatsoever of the FCC's reasoning".)

2. Assuming question 1 is answered in the affirmative, and since there was no constitutional question as to these technical violations, whether the Court of Appeals was correct in refusing to consider the other grounds of the FCC decision as to some of which constitutional questions were raised.

COUNTER STATEMENT OF THE CASE

Renewal of the radio broadcast license of Petitioner was challenged in a hearing on five issues as set out in Pet. Brief, pp. 4-5. Issues 1, 2 and 3 related to whether certain station programs constituted false, misleading or deceptive advertising or were in violation of the applicable anti-lottery statute and rules (Pet. Brief, p. 4 hearing issues 1, 2 and 3). Petitioner claimed some of these issues involved possible violations of the First Amendment, especially as to

broadcasts by preachers promising tips in the numbers game and other "blessings". (Pet. Brief, pages 13-16).

Issues 4 and 5 did not relate to program content, but solely (a) whether (issue 4) Petitioner had violated Commission Rules designed to assure good engineering practices in operating the station, and (b) whether (issue 5) such technical violations reflected such negligence, carelessness or disregard of the Commission's processes that the Commission could not rely upon the licensee to fulfill the duties and responsibilities of a licensee.

THE INITIAL DECISION OF THE ALJ

In his initial decision, the ALJ made detailed findings on numerous technical violations (Pet. App. 56d through 92d and 144d through 148d). The ALJ concluded that, in light of the pendency of the competitive application of Community, Petitioner

> "does not possess the requisite comparative qualifications to remain a Commission licensee". (Pet. App. 152d).

The ALJ described the Petitioner's previous similar technical violations for which the Commission had imposed a $7500 forfeiture, *United Broadcasting Co., Inc.*, 4 FCC 2d. 293 (1966), and noted that the new violations had not been deterred by the $7500 forfeiture. (Pet. App. 146d-148d).

THE COMMISSION DECISION

On appeal the Commission concisely, but thoroughly, reviewed the initial decision. (Pet. App. 1b-30b). It found, *inter alia*, that Petitioner's promises to hire experts to prevent a repetition of the previous technical violations were mere "window dressing" (Pet. App. 17(b)); that

"United's past representations were of no value" (*ibid.*) and that "no reliance can be placed on the present promises of future compliance" (*ibid.*). The Commission then concluded that "on the basis of its violations of the technical rules *standing alone*, we find that United's application for renewal of the license of Station WOOK must be denied". (*Ibid.*, emphasis supplied).

ARGUMENT

1. The Commission's decision not to renew Petitioner's license because of Petitioner's technical violations was supported by 132 paragraphs of detailed record findings by the ALJ (Pet. App. 56d through 92d, 144d through 148d). These findings were specific and not "conclusory" as asserted by Petitioner.

2. The Commission affirmed these findings. (Pet. App. 1b through 30b). Its opinion, like the ALJ's findings, was quite specific and not "conclusory" as claimed by Petitioner.[1] The Commission concluded (Pet. App. 17b):

[1] "United's previous history of operations of WOOK has been replete with violations of the technical rules. Those violations were the subject of an earlier hearing, where United was assessed a $7,500 forfeiture, and where, in reliance on reprsentations that its future operations would be in compliance with the technical rules, United's license was renewed. 4 FCC 2d 293. Notwithstanding the forfeiture and its representations, the violations continued. A subsequent inspection on September 3, 1969, disclosed 19 violations of the Commission's rules. Although United hired experts to oversee the operation of WOOK and the qualifications of the experts are unquestioned, the first expert was not hired until after the designation of the previous hearing on issues concerning alleged violations of the technical rules in 1965, and, after the expert died in 1967, he was not replaced and responsibility for overseeing WOOK's technical operations was left to an untrained employee until November 1970, after the issues were enlarged in this proceeding to consider violations of the Commission's technical rules. Under these circumstances we must conclude that the hiring of the experts was merely 'window dressing' employed when WOOK's license was placed in jeopardy." (Pet. App. 16b-17b).

> "Thus, on the basis of its violation of the technical rules *standing alone*, we find that United's application for renewal of the license of Station WOOK must be denied". (Emphasis supplied).

3. The Court of Appeals, therefore, quite properly affirmed the Commission on the grounds of these technical operational violations alone, as to which no constitutional question had been raised. "If two questions are raised, one of non-constitutional and the other of constitutional nature, and a decision of the non-constitutional question would make unnecessary a decision of the constitutional question, the former will be decided". *Alma Motor Co. v. Timken-Detroit Axle Co.*, 329 U.S. 129, 136 (1946).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

MONROE OPPENHEIMER
1156 15th Street, N.W.
Washington, D.C. 20005

Attorney for Respondent
Washington Community
Broadcasting Company